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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE BOARD ORDER TO SHOW CAUSE RE: POTENTIAL PATTERN OF VIOLATIONS, INCLUDING N-91-35-1-1 AND N91-26-7-1(#2), CO-OP MINING COMPANY, BEAR CANYON MINE, ACT/015/025, EMERY COUNTY, UTAH	:	BRIEF OF PETITIONER DIVISION OF OIL, GAS AND MINING DOCKET NO. 92-041 CAUSE NO. ACT/015/025

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INTRODUCTION

The Division of Oil, Gas and Mining ("Division") determined after an informal hearing on July 8, 1992, that the NOVs issued to Co-Op Mining Company ("Co-Op"), N91-35-1-1 and N91-26-7-2 (Part 2 of 2), constituted a Pattern of Violation as defined by Utah Admin. R. 645-400-332 and by Utah Code Ann. § 40-10-22 (1)(d) (1992, as amended). The Division recommended to the Board of Oil, Gas and Mining ("Board") that they issue an Order to Show Cause as to why Co-Op's permit should not be suspended or revoked pursuant to Utah Admin. R. 645-400-331 and Utah Code Ann. § 40-10-22(1)(d) (1992, as amended). In accordance with this statute and Utah Admin. R. 645-400-335, Co-Op was provided with an opportunity for public hearing before the Board on October 28, 1992.

The Board stayed the proceedings after repeated objections by the Division's counsel to attempts on the part of Co-Op to introduce evidence to refute or contradict the finalized findings of the fact of violations with regard to the NOVs at issue, and to the finalized assessments which had assessed negligence points. Based upon the stipulation of the parties, the Board set the evidentiary matter for special hearing on December 18, 1992, and requested the parties to file Briefs concerning the res judicata effect of the Board's previous final assessments and findings of violation.

The informal Division Findings, Conclusion and Order issued on July 27, 1992, was held in accordance with Utah Admin. R. 645-400-332 and the Division's policy entitled Procedure for Determination of Pattern of Violations, Utah Code Ann. § 40-10, as revised April 28, 1992 ("Policy")[1]. The Division reviewed three NOVs to determine the existence of a pattern. These were N91-35-1-1, N91-20-1-1, and N91-26-7-2 (part 2 of 2). The fact of violation was not appealed in N91-35-1-1 and N91-26-7-2 (part 2 of 2). The fact of violation was appealed in N91-20-1-1, where the fact of violation was upheld in an informal conference and the informal order from that conference was not appealed. As provided in Utah Admin. R. 645-400-333.200, the Director considered other violations at the Bear Canyon Mine during the subject twelve month period, including N91-26-7-2 (part 1 of 1),

[1]The policy entered as part of the Division's exhibit 7 at the hearing on this matter contains the previous version of the policy.

N91-35-8-1, N90-35-1-1, N90-25-1-1 and N91-26-4-3(31), in determining whether or not to exercise her discretion under Utah Admin. R. 645-400-332-100 as additional evidence of the willful or unwarranted nature of the permittee's failure to comply. The Director's review of these additional five NOVs caused her to exercise her discretion in support of finding the permittee to have, through willful or unwarranted negligence, failed to comply with requirements of the state program or its permit.

The three NOVs reviewed by the Director at the informal conference revealed that all three exceeded 16 negligence points which, pursuant to Utah Admin. R. 645-401-323.130, involves a greater degree of fault and reckless, knowing or intentional conduct. Because Utah Code Ann. § 40-10-22(1)(d) provides that a pattern may be present where the violations are the result of the willful or unwarranted nature of the permittee's failure to comply, finalized assessments and assignment of penalty points resulted in the Director's finding of a pattern.

The Director of the Division, however, determined that NOV N91-20-1-1 should not be considered for purposes of pattern of violation because it was written for failure to comply with a Division Order, and by its nature did not require substantiation through a field inspection.

The Board has before it in evidence exhibits 1-9, which the Division has introduced to meet its burden of establishing a prima facie case for suspension or revocation. The ultimate burden of persuasion that the permits should not be suspended or

revoked rests with the permittee. The issue before the Board at this special hearing concerns the ability of the permittee to collaterally attack the finalized assessments and findings of violation issued by the Board pursuant to Utah Code Ann. § 40-10-20(3) (1992, as amended).

ARGUMENT

I. CO-OP IS COLLATERALLY ESTOPPED FROM CHALLENGING THE UNDERLYING FACT OF VIOLATION AND THE ASSESSMENT OF NEGLIGENCE PENALTY POINTS BY OPERATION OF STATUTE AND PRINCIPLES OF ADMINISTRATIVE LAW.

A. The doctrine of Administrative Collateral Estoppel precludes Co-Op Mining from challenging the finalized assessment and fact of violation.

Co-Op had full opportunity to challenge the violations and the assessments, both at the time the notices of violation were issued and during the penalty assessment phase. Because Co-Op waived its right to challenge the fact of violation and the final assessment, it is estopped from challenging either of these findings during the Order to Show Cause hearing.

Under the doctrine of administrative collateral estoppel, once an agency, acting in its judicial capacity, has resolved "disputed issues of fact properly before it which the parties have had adequate opportunity to litigate," the courts can "apply res judicata to enforce repose." United States v. Utah Construction Mining Co., 86 S.CT. 1545, 1560 (1966); Accord, Utah Department of Administrative Services v. Public Service Commission, 658 P2d 601, 621 (Utah 1983). This doctrine also estoppes an aggrieved party from litigating an agency order once the party fails to appeal that order. McCulloch Interstate Gas

Corporation v. Federal Power Commission, 536 F2d 910 (10th Cir. 1976).

In McCulloch, the Court upheld the Federal Power Commission's ("FPC") order denying McCulloch's Petition for Rehearing concerning the FPC's jurisdiction over an oil pipeline. The FPC had decided, and the Court held, that McCulloch could "not collaterally attack the validity of a prior agency order in a subsequent proceeding" when McCulloch had failed to appeal the FPC's previous decision, "despite ample opportunity to do so." 536 F2d at 912-13.

Co-Op had adequate opportunity to challenge the fact of each of the violations and the corresponding finalized assessments prior to the Order to Show Cause hearing. Co-Op had, in the first instance, the opportunity to challenge the fact of violation or the proposed assessment by requesting an informal Division hearing when the Notice of Violation was issued and again when the proposed penalty was assessed[2]. In fact, NOV N91-20-1-1 was informally appealed in an informal fact of violation conference, where the NOV was upheld. However, the order from this informal hearing was not appealed.

Co-Op could have challenged the violations at the time the Notice of Violations were issued by "apply[ing] to the Board for review of the Notice [of Violations] or [cessation] order within thirty days of receipt of it . . ." Utah Code Ann. § 40-10-

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[2]Federal procedural rules do not provide for the opportunity to contest fact of violations at an informal hearing and therefore provide less due process.

23(3)(a); See also Utah Code Ann. § 40-10-20(2) (The Board shall assess civil penalty "only after the person charged for the violation . . . has been given an opportunity for a public hearing")

However, the statute is clear that failure to request the public hearing carries consequences which are the law of this case. Utah Code Ann. § 40-10-20(2) provides:

> [If] the person charged with the violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Board after the Board has determined that a violation did occur and the amount of the penalty which is warranted, and has issued an order requiring the penalty be paid.

After the penalty was issued on these violations the terms of Utah Code Ann. § 40-10-20(3) provides:

> [T]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full, or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Board for placement in an escrow account. (emphasis added)

Finally, Co-Op, in addition to this administrative due process, is granted an opportunity for judicial review. Utah Code Ann. § 40-10-22(3)(f) provides:

> [A]ction by the Board taken under this section or any other provision of the state program shall be subject to judicial review by the appropriate District Court within the state of Utah[.]

The statute is clear concerning the legal effect of the failure of Co-Op to appeal to the Board and pay the finalized penalty amount into escrow. Utah Code Ann. § 40-10-20(3) provides:

> [F]ailure to forward the [penalty amount] to the Board within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Because Co-Op has failed to challenge the violation, Co-Op has waived its legal right to contest the violations and the penalty points.

Three U. S. Circuit Courts and numerous U. S. District Courts have upheld the constitutionality and validity of both the prepayment requirement prior to a formal hearing and the resultant issue of the right to contest the underlying order. In Graham v. Office of Surface Mining, Reclamation and Enforcement, 722 F2d 1106, 1111 (3rd Cir. 1983), the Court held that "the review procedures which were available to Graham without prepayment of the proposed penalty are more than sufficient to comply with due process requirements . . ." The Third Circuit held that Graham, having waived its legal right to contest the penalty had received full due process. 722 F2d 1109.[3] Co-Op has had adequate due process by virtue of its opportunities to challenge both the fact of violations and the proposed assessments. Co-Op, having not challenged the violations and the penalties assessed, has waived its legal right to challenge the these during the Order to Show Cause hearing, both by operation

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[3]The Court did not rule on whether Graham had waived its right to contest the fact of violation because this issue was not raised upon appeal. In similar cases where the fact of violations were raised, the Courts held that failure to prepay the proposed penalty also precluded a party from challenging the violation. B&M Corporation v Office of Surface Mining, Reclamation and Enforcement, 699 F2d 381 (7th Circuit, 1983).

of the administrative collateral estoppel doctrine and Utah Code Ann. § 40-10-20(3).

B. The principle of res judicata and the Administrative Rules do not allow extrinsic evidence for the purpose of rebutting the Division's prima facie case of a pattern.

Co-Op wishes to put on testimony concerning the degree of negligence attributable to the NOVs which constitute the pattern. Because the principle of res judicata and collateral estoppel apply here, the only question which remains is to determine whether the rules themselves, when applied to the penalty points for negligence, are conclusive as to the willful or unwarranted nature of the permittee's failure to comply. Neither Utah statute or rule defines willfully or unwarranted failure to comply within the pattern of violation section of the rules. However, the federal rules at 30 C.F.R. § 843.5 at the definition section provide the following specified meanings:

> Unwarranted failure to comply, means the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit of the Act due to indifference, lack of diligence, or lack of reasonable care.

The definition further provides:

> Willful violation, means an act or omission which violates the Act, this chapter, the applicable program, or any permit condition required by the Act, this chapter or the applicable program, committed by a person who intends the result which actually occurs. 30 C.F.R. 843.5.

The Utah Rules at Utah Admin. R. 645-401-300 set forth the point system for penalties. The point system for penalties provides for points to be attributed based upon the operator's

history of previous violations, the seriousness of the violation, the degree of fault and the operator's demonstrated good faith by considering the measures taken to abate the violation. The Utah Rules at Utah Admin. R. 645-401-332 address the degree of fault. The rules provide in pertinent part as follows:

> 323.100 the assessment officer will assign up to thirty points based on the degree of fault of the permittee in causing or failing to correct the violation, the conditions, or practice which led to the notice or order, either through act or omission. Points will be assessed as follows:
>
> 323.100 A violation which occurs through no fault of the operator or by inadvertence which was unavoidable by the exercise of reasonable care will be assigned no penalty points for degree of fault;
>
> 323.120 A violation which is caused by fault of the operator will be assigned fifteen points or less depending on the degree of fault; fault means the failure of the permittee to prevent the occurrence of any violation of his or her permit or any requirement of the state program due to indifference, or lack of reasonable care, or the failure to abate any violation of such permit or the state program due to indifference, lack of diligence or lack of reasonable care; and
>
> 323.130 A violation which occurs through a <u>greater degree of fault meaning reckless knowing or intentional contact will be assigned sixteen to thirty points,</u> depending on the degree of fault.
>
> 323.200 In calculating points to be assigned for degree of fault <u>the acts of all persons working on the coal exploration or coal reclamation project site will be attributed to the permittee,</u> unless the permittee establishes that they were acts of deliberate sabotage. (emphasis added)

As the final summary page of Division's exhibit #7 demonstrates, N91-35-1-1 and N91-26-7-2 (part 2 of 2) received assessments points of 23 and 25 points respectively. The final points assigned for degree of fault, when taken in the context of

the Utah State Program rules and the supporting 30 C.F.R. rules, demonstrate that there is no question as to a determination of a finding of pattern on Co-Op's part.

II. THE DIVISION WOULD BE PREJUDICED AND THE STATE'S INTEREST WOULD BE COMPROMISED UNFAIRLY BY ALLOWING CO-OP TO COLLATERALLY ATTACK THE FINALIZED ASSESSMENTS AND FACT OF VIOLATION.

The Division need only make a prima facie case demonstrating the existence of a pattern of violations. Because the ultimate burden of persuasion rests on Co-Op, requiring the Division to re-litigate matters which have been waived by the permittee would result in an undue and onerous burden on the Division. This result would be unavoidable if the principle of res judicata were not upheld. Any attempt to re-litigate the issues by Co-Op would require the Division to be prepared to present evidence and rebuttal on any one of numerous points which the permittee might have attacked, had it exercised its due process rights to do so in the first instance.

Additionally, as discussed in the argument immediately above, one of the basis for the assessment of points consists of the operator's prior violation history. The Division relies upon the finality of an assessment and a finding of violation pursuant to Utah Code Ann. § 40-10-20(2) in assessing history points in final violations for other NOVs. It would be incongruous for the operator to be able to demonstrate to the Board, when it has the burden of persuasion, that a fact of violation was wrongfully applied and not require the Division to go back and modify the penalties assessed for all subsequent assessments which were made

upon reliance of the finality of the NOV or NOVs that are the subject of the Order to Show Cause hearing.

CONCLUSION

Basic principles of res judicata, collateral estoppel and administrative law, as well as the weight of constitutional interpretation finding that Co-Op has received all the due process to which it is entitled, require this Board to limit Co-Op to the presentation of evidence which does not amount to a collateral attack upon a final agency order.

RESPECTFULLY SUBMITTED this 9 day of December, 1992.

Thomas A. Mitchell
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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF PETITIONER DIVISION OF OIL, GAS AND MINING in Docket No. 92-042, Cause No. ACT/015/025 to be mailed by certified mail, postage prepaid, on the 9th day of December, 1992, to the following:

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